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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff and Respondent,

v.

NORTH AMERICAN CAPACITY INSURANCE COMPANY,

Defendant and Appellant.

E047908

(Super.Ct.No. RIC505103)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed.

Grimm, Vranjes, McCormick & Graham, A. Carl Yaeckel, Charles A. Phillips and Gregory B. Thomas for Defendant and Appellant.

Archer Norris, Danielle A. Arteaga and Rand L. Chritton for Plaintiff and Respondent.

1. Introduction

Rand L. Chritton (Chritton), with the law firm of Archer Norris (Archer Norris),

represents plaintiff Great American Insurance Company (Great American). A. Carl Yaeckel (Yaeckel), with the law firm of Grimm, Vranjes, McCormick & Graham (Grimm), represents defendant North American Capacity Insurance Company (NA Capacity). Yaeckel also represents Capacity's sister company, North American Elite (NA Elite) in a different lawsuit, *Asian Inc. v. Hartford, et al.* (Super.Ct. S.F. City and County, No. GCG0847384). Chritton once provided a coverage opinion concerning the *Asian* insurance claim.

When Great American sued NA Capacity in the present dispute involving insurance coverage, NA Capacity responded by filing a motion seeking to disqualify Archer Norris. The trial court denied the motion. NA Capacity appeals.

We offer two conclusions: first, that the trial court properly ruled that NA Elite was not represented by Archer Norris; and, second, even if Archer Norris could be said to represent NA Elite, it did not represent NA Capacity.[1] Therefore, the trial court correctly denied NA Capacity's motion to disqualify Archer Norris as the lawyer for Great American.

2. Factual and Procedural Background

NA Capacity and NA Elite are sister companies, together with North American Specialty (NA Specialty), wholly owned by Swiss Reinsurance America, Inc., with offices in New Hampshire. The companies have the same corporate officers. They share

[1] We deny NA Capacity's pending motion to take evidence. (Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252.)

the same claims department. Swiss Reinsurance is financially responsible for claims payments for the companies.

NA Elite employed Alliance Member Services (Alliance) as its California claims adjuster. Alliance, in turn, employed Archer Norris to render coverage opinions involving NA Elite insurance policies. NA Elite never retained or consulted with Archer Norris directly. But NA Elite reimburses Alliance for fees paid to Archer Norris.

In the *Asian* lawsuit, Yaeckel, NA Capacity's lawyer in the present case, represents NA Elite. In 2007, Chritton had provided coverage opinions to Alliance in the *Asian* lawsuit.

In August 2008, Great American filed the present complaint for equitable contribution from NA Capacity for settlement of a separate construction defect lawsuit, *Lyons v. Trimark Pacific Homes* (Super. Ct. Riv. County, 2008, No. RIC431845). Chritton did not provide coverage opinions involving the *Lyons* lawsuit.

3. Discussion

In summary of the foregoing: Yaeckel and Grimm represent NA Capacity and NA Elite; Chritton and Archer Norris represent Great American and Alliance, NA Elite's California claims adjuster. The issue is whether Archer Norris can also be said to represent, by extension, NA Elite and NA Capacity. In its motion to disqualify, NA Capacity argued that—because Chritton represented Alliance for the benefit of NA Elite and because Yaeckel represented NA Elite in the *Asian* lawsuit—Archer Norris should be disqualified from representing NA Elite's sister company, NA Capacity, in the present case. We disagree.

The Court of Appeal reviews a trial court's ruling on an attorney disqualification motion for abuse of discretion, accepting as correct all express or implied findings that are supported by substantial evidence but, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.*(2004) 124 Cal.App.4th 594, 601; *Ochoa v. Fordel, Inc.* (2007) 146 Cal.App.4th 898, 906, citing *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144.)

A motion to disqualify is governed by rule 3-310(C), of the Rules of Professional Conduct, which provides: "A member shall not, without the informed written consent of each client . . . (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

Applying that rule here, NA Capacity contends that Chritton and Archer Norris cannot, without informed written consent, represent Great American because of Alliance's relationship with NA Elite. In other words, Archer Norris is engaged in improper concurrent representation of Great American, NA Elite, and NA Capacity. The trial court made a finding that NA Elite was not Chritton's client but that, even if it was, there was no prejudice. We agree that NA Elite is not Chritton's client.

The party seeking disqualification bears the burden of showing a prohibited dual representation. (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729, citing *In re Lee G.* (1991) 1 Cal.App.4th 17, 27.) Here Great American cannot successfully argue that because Chritton represents Alliance and Alliance is an agent of

NA Elite, then Chritton represents NA Elite, creating a conflict of interest with NA Capacity.

No express attorney-client agreement exists between NA Elite and Chritton. (*Koo v. Rubio's Restaurants, Inc., supra,* 109 Cal.App.4th at p. 729.) Nor is there substantial evidence to support an implied agreement for representation. (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126.) Even though it may have received copies of coverage evaluations prepared by Chritton, NA Elite never directly sought legal advice from Chritton. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 881-812.) Alliance hired Chritton but NA Elite had no contact with him.

The subjective belief of Patrick Rago of NA Elite did not create an attorney-client relationship. (*Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1010.) In *Zenith*, an analogous case involving complicated insurance relationships, the appellate court determined that the Zenith Insurance Company could not claim an attorney-client relationship with the Cozen law firm, which had been hired by the Royal Insurance Company. Similarly, NA Elite cannot claim it was represented by Chritton who was hired by Alliance. (*Id.* at p. 1008.)

Adopting the *Zenith* reasoning: "An essential predicate for establishing an attorney's duty of care under an 'intended beneficiary' theory is that *both* the attorney, [Chritton], and the client, [Alliance], must have intended [NA Elite] to be a beneficiary of legal services [Chritton] was to render. (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 832 [Dist. 4, Div.2].) Even if the lawyer's representation could *incidentally* benefit the claimant, that does not sufficiently satisfy this predicate. (*Goldberg v. Frye* (1990)

217 Cal.App.3d 1258, 1268; *Mason v. Levy & Van Bourg* (1978) 77 Cal.App.3d 60, 67-68.) This rule governs the analysis, even if the attorney knows that third parties will be affected by his representation of his client. Without more, such knowledge is not sufficient to create a duty of care. (*Burger v. Pond* (1990) 224 Cal.App.3d 597, 604-606.) [Dist. 4, Div. 2.]" (*Zenith Ins. Co. v. O'Connor, supra,* 148 Cal.App.4th at p. 1008.)

Alliance, not NA Elite, hired Chritton. Chritton could not ethically represent both Alliance and NA Elite because their interests could be divergent. In such circumstances, it would be impossible to conclude that either Alliance or Chritton ever intended to confer upon NA Elite beneficiary status of Chritton's legal services performed for Alliance. (*Zenith Ins. Co. v. O'Connor, supra,* 148 Cal.App.4th at p. 1008.)

There is also no evidence that NA Elite ever disclosed confidential communications to Chritton. (*Lister v. State Bar, supra*, 51 Cal.3d at p. 1126.) Instead, Chritton communicated directly with Alliance and Alliance communicated with NA Elite. Nor does the fact that NA Elite reimbursed Alliance for fees paid to Archer Norris establish an attorney-client relationship. (*Zenith Ins. Co. v. O'Connor, supra,* 148 Cal.App.4th at p. 1009.)

Furthermore, even if an attorney-client relationship could possibly be construed between Archer Norris and NA Elite, an attorney-client relationship cannot be implied between Archer Norris and NA Capacity. Generally, parent and subsidiary corporations are separate entities. Representing one does not automatically create an attorney-client relationship with the other for conflict of interest purposes. (*Baxter Diagnostics, Inc. v.*

AVL Scientific Corp. (C.D.Cal. 1992) 798 F.Supp. 612, 616, fn. 3; *Brooklyn Navy Yard Cogeneration Partners v. Sup. Ct. (Parsons Corp.)* (1997) 60 Cal.App.4th 248, 255; *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 243-244.) The same rule should apply to sister subsidiary corporations sharing the same parent corporation as to parent and subsidiary corporations.

In the present case, NA Capacity has not shown that it should be treated as sharing a "unity of interest" with NA Elite. A four-prong test for unity includes that the two companies share confidential information; one company controls the other; they have integrated operations and share management personnel; and they are potentially adverse to each other in connection with the subject matter of the lawyer's representation. (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, supra*, 69 Cal.App.4th at pp. 245-254; see *Baxter Diagnostics Inc. v. AVL Scientific Corp., supra*, 798 F.Supp. at p. 616, fn. 3—unity of interests sufficient to disregard separate corporate entities, resulting in counsel's disqualification.) Here NA Capacity supplied some evidence of the third factor but the evidence also established that NA Capacity maintains a separate office for its California claims and, unlike NA Elite, does not use Alliance for claims adjusting. The four factors establishing unity of interest was not demonstrated by substantial evidence.

4. Disposition

We uphold the trial court's ruling denying NA Capacity's motion to disqualify.

Great American, the prevailing party, shall recover its costs on appeal.

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s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/King
J.